(18)

No. 94-1893

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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1. Respondents agree that further review is warranted in this case, but they contend that this Court should not remand the case to the court of appeals for further consideration in light of the Federal Communications Commission's Third Report and Order, which construed the Commission's authority to waive the cross-ownership bar of 47 U.S.C. 533(b). Respondents' principal argument (Resp. 13-14) is that a losing party may not obtain vacatur of a lower court's judgment through its unilateral action. See *id.* at 14 (citing *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 392

(1994)). They contend, rather, that this Court should proceed to consider the constitutionality of Section 533(b), even though the operation of that statute has been substantially altered by the Third Report and Order, and even though no court of appeals has addressed the constitutionality of the statute in combination with the FCC's new construction of its waiver authority.

The remand that we have suggested in this case is not at all similar to the vacatur that the Court considered in *Bonner Mall*. We have not argued that this case should be dismissed as moot because of the Third Report and Order, or that the Court lacks power to consider the constitutionality of the cross-ownership bar in combination with the FCC's new rule.[1] Certainly, the Court could grant review to consider the constitutionality of the statute and the waiver authority as construed by the FCC—just as it did in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). There the Court granted review to consider the government's contention that

[1] Given that we have suggested only a remand, not a vacatur for dismissal, the mootness cases cited by respondents (Resp. 15-16 & n.19) have little relevance. Moreover, respondents' position that the case should not be remanded because the FCC could simply reverse its construction of its waiver authority in the future (*id.* at 15) is seriously overstated. The FCC's action was taken pursuant to the notice-and-comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553; any modification of the FCC's construction of the waiver provision would also have to satisfy the requirements of the APA, and would be subject to judicial review as well. None of the mootness cases cited by respondents involved a similar situation, where a party's decision to adopt or change a course of conduct was procedurally constrained by applicable law.

18 U.S.C. 2252 was constitutional because it contained a scienter requirement, even though the government had not made that argument to the court of appeals, and the court of appeals had held the statute invalid because, in its view, the statute did not require proof of scienter.

Our suggestion of a remand is premised on the fact that the legal landscape has been substantially altered by the FCC's action (undertaken after a full rulemaking in which respondents had the opportunity to submit comments on the waiver issue). Should the Court grant plenary review at this time, the constitutional issue that will be the subject of the briefs and arguments will be quite different from the constitutional issue that was addressed by the court of appeals and the district court and was the subject of their opinions. Whether or not there is a factual record to be built below (Resp. 15), the legal and constitutional issues raised by the Third Report and Order are complex, and this Court may benefit from the court of appeals' consideration of them. Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 66 (1989) (remanding, after plenary review, for consideration by court of appeals of Origination Clause claim). For example, it is now clear that respondents intend to challenge the validity of the FCC's construction of its waiver authority (Resp. 20-23), but that challenge itself will require extensive briefing, and "[f]or this Court to review regulations normally required to be first reviewed in the Court of Appeals, before such review is had, is extraordinary." *EPA* v. *Brown*, 431 U.S. 99, 104 (1977) (per curiam); see also *City of Chicago* v. *Environmental Defense Fund*, 113 S. Ct. 486 (1992) (remanding case involving household-waste exclusion

provision of Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6921(i), for reconsideration in light of intervening EPA policy directive). Similarly, the courts' inquiries into whether the cross-ownership bar is narrowly tailored, and whether there are adequate, alternative channels of communication available to respondents, must now take into consideration the operation of the Third Report and Order and the opportunities for speech made available to respondents by the FCC's action.[4]

Respondents suggest (Resp. 12-13) that this Court has never remanded a case for reconsideration in light of a litigant agency's attempt to cure the constitutional defects in a statute under review. The Court did exactly that in *State Tax Commission* v. *Herzog Brothers Trucking, Inc.*, 487 U.S. 1212 (1988), in which New York sought review of a judgment of the New York Court of Appeals that the State could not require Indian trading firms to pre-

[4] Although respondents suggest that there is no more reason in this case than in *X-Citement Video* to remand for further consideration, a remand is more appropriate in this case, because no court of appeals has considered the constitutionality of the statute in light of the FCC's Third Report and Order. In our petition for a writ of certiorari in *X-Citement Video*, we pointed out that, although no court of appeals other than the Ninth Circuit had directly addressed whether 18 U.S.C. 2252 was unconstitutional because it contained no scienter requirement, other courts of appeals had stated that the statute did contain such a requirement. See Pet. for Cert. at 11-15, *United States* v. *X-Citement Video, Inc.*, No. 93-731. Thus, there was a conflict among the courts of appeals on the construction of 18 U.S.C. 2252. In this case, no court of appeals has addressed the constitutionality of 47 U.S.C. 533(b) in combination with the FCC's construction of its waiver authority.

pay excise and sales taxes on motor fuels sold to Indian retailers for subsequent resale to Indian and non-Indian customers. In our *amicus curiae* brief filed at the petition stage, we advised the Court of our view that New York could require prepayment of taxes on fuel delivered for sale to non-Indian customers, but could not do so for fuel to be resold to Indian customers, "at least where it is reasonably practicable for the State to provide for an exemption from the prepayment requirement for the estimated portion of the fuel that will be sold to Indians." U.S. Br. at 7, *State Tax Comm'n* v. *Herzog Bros. Trucking, Inc.*, No. 87-382 (June 1988). We also informed the Court that New York's Commissioner of Taxation and Finance had published for comment regulations to provide an exemption from the pre-collection of the motor fuel excise tax attributable to fuel sold for resale to Indians, and that the State intended to adopt a comparable approach to the pre-collection requirement under the state sales tax statute as well. *Id.* at 15-16. We suggested that the Court of Appeals should consider, in the first instance, whether the regulations eventually adopted by New York adequately accommodated the federally protected interests of the Indian customers. *Id.* at 15-17. In light of the information conveyed in our *amicus curiae brief*, this Court vacated the judgment and remanded the case to the New York Court of Appeals for reconsideration. We believe that a similar course of action is appropriate in this case.[5]

[5] As we explain in our petition (Pet. 17 n.10), this suggestion is consistent with the approach we have followed in similar litigation in the Ninth Circuit. The FCC issued its notice of proposed rulemaking (NPRM) on January 20, 1995,

2. Respondents criticize the FCC (Resp. 16-19) for adopting its construction of the waiver authority late in the day, and they suggest that the FCC has waived the opportunity to raise the argument that the statutory regime is constitutional because of the expanded opportunities for speech afforded by the Third Report and Order. It cannot seriously be maintained, however, that the FCC has done something improper in adopting a construction of a statute that would cure its purported constitutional defects. As the FCC pointed out in both the notice of proposed rulemaking (Pet. App. 150a) and the Third Report and Order (Supp. Br. App. 19a), this Court has admonished that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." See *X-Citement Video*, 115 S. Ct. at 467. The FCC should not be deprived of the opportunity to preserve the bulk of the regime enacted by Congress merely because possible constitutional defects in the statute have come to light and have become more pressing as a result of litigation, rather than in some other fashion.

Respondents also ignore the major technological changes that have overtaken the cable industry since the cross-ownership bar was enacted, and even since

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after a panel of the Ninth Circuit issued decisions in two cases declaring Section 533(b) unconstitutional. *US West, Inc.* v. *United States*, 48 F.3d 1092 (1995); *Pacific Telesis Group* v. *United States*, 48 F.3d 1106 (1994). The government subsequently filed petitions for rehearing and suggestions for rehearing en banc in the Ninth Circuit, based in part on the FCC's NPRM. On May 25, 1995, the Ninth Circuit denied the government's petitions for rehearing and suggestions for rehearing en banc, without apparent consideration of the FCC's Third Report and Order.

this litigation was commenced. Those advances have made video dialtone practicable, whereas just a few years ago it was not possible to deliver video signals over telephone wires. See Supp. Br. App. 12a-13a. Because of those advances, the FCC is developing a regulatory regime pursuant to which local telephone companies (LECs) can enter the market for direct distribution of video programming without endangering the fundamental purposes of Section 533(b), protecting competition and advancing the First Amendment values in diversity in communications.

There is therefore no merit to respondents' contention that the FCC's action is precluded by the construction of Section 533(b)(4) in *National Cable Television Association* v. *FCC*, 914 F.2d 285 (D.C. Cir. 1990). That case arose before the constitutional issues raised by Section 533(b) had been fully aired in the courts. It also involved a situation in which the LEC would have participated in the construction of the first cable system in the community; thus, it did not implicate the participation by LECs now envisioned by the FCC in video dialtone, under which the LECs could offer video dialtone as an alternative to the incumbent cable operator. Both the technological changes and the litigation on the constitutionality of Section 533(b) justified the FCC's revisiting its waiver authority since that decision, as the FCC explained in its notice of proposed rulemaking and its Third Report and Order. See Pet. App. 150a; Supp. Br. App. 11a, 20a-21a.

Although the parties did address the effect of the statute's waiver provision in the lower courts, to a limited extent (Resp. 17-19), there was no reason for the parties or the court of appeals to discuss that provision in detail, given that the FCC had not yet